United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7385

United States Court of Appeals

FOR THE SECOND CIRCUIT

W. T. GRANT COMPANY,

Plaintiff-Appellee,

—against—

MARK S. HAINES,

Defendant-Appellant,

—and—

JOHN A. CHRISTENSEN, ET AL.,

Defendants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

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UNITED STATES COURT OF APPEALS
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-against-

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Defendant.

Appeal from the United States District Court
for the Southern District of New York

BRIEF FOR APPELLEE

ISSUES PRESENTED

1. Where defendant-appellant Haines, a former high-level fiduciary in plaintiff-appellee's real estate department was interviewed by appellee's attorneys on company premises and on company time in the presence of his employer in connec-

tion with charges that appellant received improper kickbacks at a time when appellant was not represented by an attorney, was the District Court's denial of appellant's motion to dismiss the complaint against him, or in the alternative, to disqualify appellee's law firm, a proper exercise of discretion?

A. The Court below answered in the affirmative.

2. Where an order of attachment was granted on notice to appellant and entered on February 3, 1975, is appellant's purported appeal from the granting and continuing of the attachment, an interlocutory order which is not appealable and otherwise untimely and jurisdictionally defective?

A. Appellee submits that the answer should be in the affirmative.

3. Where the District Court dismissed service of process upon appellant and continued the attachment and the bond in effect for twenty (20) days in which appellee was allowed to file an amended complaint, or pending appeal, is such an order appealable, and if so was such decision improper.

A. Appellee submits that the answer should be no.

CORRECT FACTS

By virtue of the numerous misstatements and half-truths contained in appellant's "Statement of the Case", appellee is constrained to present to this Court a detailed counter-statement of the facts.

Nature of the Action

Appellee instituted this action against thirteen named defendants[1] including five (5) individuals and eight (8) corporations, and certain other unnamed defendants to recover damages approximating $25,300,000. and injunctive relief. Jurisdiction of the action was founded upon §4 of the Clayton Act (15 U.S.C. §15) by reason of defendants' violation of §1 of the Sherman Act (15 U.S.C. §1) and principles of common law. The jurisdiction with respect to plaintiff's common law causes of action was based upon (a) diversity of citizenship (28 U.S.C. §1332), and (b) principles of pendant jurisdiction. Appellant was served with process in New York and thereafter an order of attachment was obtained on notice against appellant and other

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[1] John A. Christensen, Mavis Christensen, Mark S. Haines, Daniel Quinlan, John W. Waits, John W. Waits doing business as John W. Waits Associates, JWW, Inc., Centurion Development Corporation, Centurion of Louisiana, Inc., Mid-America Development, Development Corporation of Mid-America, Inc., Umbaugh Pole Building Company, Inc. Frontier Development Corporation. John A. Christensen, Mark S. Haines and Daniel Quinlan are at times collectively referred to as the "employee defendants." John W. Waits, John W. Waits doing business as John W. Waits Associates, JWW, Inc., Centurion Development Corporation, Centurion of Louisiana, Inc., Mid-America Development and Development Corporation of Mid-America, Inc. are at times collectively referred to as the "developer defendants."

defendants. The action was predicated upon a conspiracy engaged in among certain of the defendants who had been high-level employees of appellee (including appellant who had been the Southern Regional Director of appellee's real estate department) and real estate developers. The complaint (A. 42-73)[2] charged the defendants with having engaged in the conspiracy to inter alia:

(A) violate the Anti-Trust Laws of the United States by restricting competition by limiting appellee's access to other shopping center developers and landlords throughout the United States;

(B) violate various sections of the Penal Law of the State of New York,[3] and §340 of the General Business Law of the State of New York (The Donnelly Act);[4]

(C) commit acts of unfair competition;

(D) violate various sections of the Penal and Business Laws of the States of Connecticut, Georgia, Illinois, Kentucky, and Louisiana, and other jurisdictions;

(E) defraud appellee of its money and property;

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[2]Numbers in parentheses following "A." are to pages in the Appendix, unless otherwise indicated.

[3]New York Penal Law §§155.05, 155.30, 155.35, 165.15, 165.20, 175.05, 175.10, 180.00, and 180.05 (McKinney 1975).

[4]New York General Business Law §340 (McKinney 1968).

(F) convert appellee's money and property to defendants' own use and benefit;

(G) abuse the trust and confidence appellee placed in the employee defendants;

(H) effect and induce breaches of the fiduciary duties the employee defendants owed to appellee.

Appellee is a nationwide retailing organization, which until recently[5] operated more than one thousand (1000) stores with related facilities, including distribution centers and the like, throughout the United States. In recent years, appellee's annual sales exceeded one and one-half billion dollars. (A. 113).

The employee defendants were all senior executives in appellee's real estate department and were entrusted with responsibility for negotiating, recommending and approving leases for stores located or to be located in shopping centers throughout the United States upon terms most favorable to appellee, including, but not limited to, price and location. (A. 113). In the course of the employee defendants' duties, they did in fact negotiate, recommend and approve leases with the developer defendants. (A. 113). Throughout the period of the employee

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[5]On October 2, 1975, appellee filed a petition for reorganization pursuant to Chapter XI of the Bankruptcy Act.

defendants' employment, appellee paid salaries and valuable fringe benefits to the disloyal employee defendants, without knowledge of their disloyalty and dishonesty, in the sum of at least $942,565. (A. 114).

Appellee was not informed by any of the defendants that such leases were obtained through the bribery of appellee's employees. (A. 113). Moreover, appellee was unaware at the time that the leases were entered into that the locations of the shopping centers, with respect to the attraction of customers and the build-up and development of sales, were poor and not in appellee's best interests. (A. 113). In fact, appellee had no knowledge of such acts until approximately January 20, 1975. (A. 113). Under no circumstances would appellee have entrusted such important and extensive negotiations, involving as it did the expansion by appellee into shopping center complexes located throughout the United States, to disloyal executive employees who were on the payroll of the real estate developers with which they were negotiating. (A. 113-114).

The various illicit schemes, kickbacks and payments were set forth in detail in the affidavits submitted to the District Court in support of the order of attachment. (A. 109-134, 74-99). Since the facts of the payments directly made to the employee defendants are set forth in detail in those papers, they will not be repeated at length in this brief except as they

relate to appellant. This Court is respectfully referred to those papers for a detailed recitation of the facts relating to the other defendants.

The January 31, 1975 Interview

At the outset, we note that appellee and its counsel dealt straightforwardly with appellant, were open, honest and above board while cognizant of their duty to be zealous on behalf of their client.[6] As the District Court stated:

> "There was no deception practiced by the attorneys insofar as concerns their character and the nature of their representation. They disclosed immediately that they were members of a law firm which has been retained by Grant to look into problems affecting certain of Grant's commercial dealings with shopping center developers and landlords. The identity of Kelly, Grant's house counsel, was apparently known to movant. At the beginning, the members of the law firm present were introduced and identified. Movant was informed that these attorneys were representing plaintiff and investigating claims of their client which for simplicity may be characterized as suggestions or charges of commercial bribery." (A. 254).

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[6] Canon 7, American Bar Association Code of Professional Responsibility provides:

"A lawyer should represent a client zealously within the bounds of the law." New York Judiciary Law, ABA Code of Professional Responsibility, Canon 7 (McKinney 1974-75 Supp.)

This fact is made even clearer by the colloquy between Judge Brieant and counsel for appellant on April 14, 1975

> "THE COURT: Do you perceive any contested issues of fact which facts are material to the disposition of this particular motion? Is there something here you regard as requiring an evidentiary hearing?
>
> MR. LAYTON: No, your Honor. We believe that the law is plain that the fact that on that day Mr. Haines was not represented by counsel is irrelevant because the only reason he was not represented by counsel is because of the deliberate decision by Grant and its counsel not to inform him that he had been sued.
>
> THE COURT: Am I correct in understanding that since this conference began your client knew or was directly informed these people were attorneys for Grant and that they were in an adversary position to your client to the extent that they were charging your client with a crime or at least highly immoral conduct with respect to his fiduciary obligations to Grant as an employee? That seemed clear at the outset, didn't it?
>
> MR. LAYTON: It became clear they were investigating this conduct and that it was an adversary circumstance.
>
> THE COURT: And that they thought he had done something wrong?
>
> MR. LAYTON: Very wrong, yes." (A. 272-273)

* * * *

"THE COURT: What was the detriment that resulted to your client from this procedure?

MR. LAYTON: The interrogation by adverse counsel for a substantial period of time with respect to the very subject matter at issue in the litigation.

THE COURT: But they knew when they were being asked, did they not, that the attorney was adverse to them, that he was representing Grant and that he was at least inferentially accusing your client of wrongdoing?

MR. LAYTON: That's right. As Judge Owen held --

THE COURT: It was more than inferential, it was pretty explicit. Your client could have told them he was doing nothing wrong and could have told them where to place their electronic equipment, he could have told them what to do with it." (A. 274)

It is also undisputed that appellant was not represented by counsel at the time he was interviewed on January 31, 1975. Indeed, counsel for appellant so acknowledged:

"THE COURT: These people had no counsel with respect to this incipient controversy with Grant, did they?

MR. LAYTON: At that time, that's right. But --

THE COURT: It isn't a case of going behind adverse attorney's back?

MR. LAYTON: That's right . . . ." (A. 275)

Throughout the course of the interview appellant was fully aware of the seriousness of the matter under discussion:

> "THE COURT: They made a very serious charge against him, didn't they?
>
> MR. LAYTON: Charges are made against employees with some frequency.
>
> THE COURT: They told him, 'We think you did such and such'; isn't that what they told him?
>
> MR. LAYTON: Yes." (A. 279)
>
> * * * *
>
> THE COURT: It is clear there was no subterfuge as to whose side the attorneys were on.
>
> MR. LAYTON: That's right.
>
> THE COURT: And there was no withholding of the fact the employer and the attorney were charging him with a serious wrongdoing; that was made clear at the beginning of the interview, is that so?" (A. 283)

The facts relating to the conduct of the interview are incorrectly set forth in the appellant's brief. An attempt is made to convey the impression that there was five and one-half hours of uninterrupted confrontation (appellant's brief, p. 9). Such was not the case. Appellee's counsel first met with appellant some time between 9:30 A.M. and 10:00 A.M. on

January 31, 1975. (A. 210) By 10:25 A.M. appellant met with Mr. Detweiler, the polygraph examiner. (A. 188). Before that time appellee's counsel and Mr. Detweiler met separately, and appellant was alone, while the attorney spoke to Mr. Detweiler about the background of the case. (A. 188,213). There is no dispute that appellant voluntarily agreed to take the polygraph and he met with Mr. Detweiler who outlined the procedure and requested preliminary information, in the absence of appellant's counsel. (A. 188-190).

Before the polygraph examination was given, appellant read and signed a polygraph agreement (A. 190) which explicitly stated that he "willingly and voluntarily agreed to the examination"; that "no duress, coercion, promise of reward or promise of immunity was made to him"; and - we emphasize this - which further provided:

> "I have been told of my rights to consult a lawyer before taking this test." (A. 223).[7]

After the polygraph examination had been concluded, appellee's attorney offered lunch to appellant. (A. 214). Only

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[7]Note the typographical error at the bottom of A. 213 which should properly read "no promise of reward ...".

thereafter was there a further brief interview between appellant and the attorney. (A. 214).

That interview occurred after the morning session during which appellant had been: informed by appellee's attorneys of all the facts that appellee then knew; shown all of the checks issued through the Waits companies that appellee then had in its possession; asked questions reflecting appellee's knowledge and insight into his trips with defendant Waits. That second interview followed explicit advice to appellant that he had the right to consult a lawyer. So it is clear that he knew throughout that he could have refused to talk; could have refused to take the polygraph test; could have demanded the presence of a lawyer. He proceeded consciously, deliberately and on his own initiative. The only conclusion that can fairly be drawn from these facts is that he thought he could hoodwink appellee by fabricating a story to cover-up his illegal actions. However, he imparted no information which was not already in appellee's possession. (A. 120-126, 205).

The record makes clear that no promise of any kind whatsoever was made to appellant. The statements to the contrary at A. 179 and in appellant's brief are flatly refuted by

the transcript of the interview (A. 9-40), and the affidavits of Messrs. Detweiler (A. 187-191), Kelly (A. 203-208) and Kirschner (A. 209-219).

Appellee's attorney made it clear at the inception of the interview that he was asking questions about appellant's lease dealings with defendant Waits (A. 9). Indeed, when he asked appellant to identify the shopping centers and locations that he negotiated and leased for appellee, it was appellant who responded "[W]ith Mr. Waites?" (sic).(A. 10). Thereafter appellant was asked a direct question:

> "Mr. Haines, in connection with your dealings with Mr. Waites (sic) and any of his associates, did you accept or agree to accept any gifts or gratuities of any kind whether cash, merchandise, automobiles, trips, vacations or any type of benefits from Mr. Waites (sic) or any of his associates?" (A. 11).

When appellant began discussing trips that he took with defendant Waits the attorney asked:

> "Was this during a time when you were negotiating with Mr. Waites (sic) and his companies for shopping centers on behalf of Grant?" (A. 16).
>
> Appellant responded:
>
> ". . . if you're trying to get to the inference that he was paying for picking locations, I do resent it." (A. 16).

Thus, within less than five minutes of having met appellee's attorney, appellant knew that he was being questioned about accepting bribes for picking locations. In fact, appellee's attorney very frankly and flatly stated "... I do want to find out. These things have evidently come to out (sic) attention." (A. 16). It was appellant who responded "I want to clear the air as I'm sure you do." (A. 16). The attorney responded:

> "... Whatever inference you draw from what I'm saying -- anything you want to add please do so because I'm only interested in finding out the truth, ok?" (A. 16).

At a subsequent point in the interview the attorney specifically gave appellant the opportunity to fully clarify the situation:

> "Now, Mr. Haines, is there anything at all that you want to add by way of explanation, that you want to tell me to clarify that you think may be a misconception or anything about your dealings with Mr. Waites (sic) and his companies?" (A. 25)

Subsequently, the attorney again gave appellant the opportunity to come forward with additional information and appellant was specifically informed that he was being given the opportunity

to clear his name from this situation if that was possible.

> "If you have any additional information which you think would help us tell us that. We'd like to be able to clear your name from this if that's possible." (A. 26)

At the beginning of the short afternoon interview, the attorney specifically asked appellant whether he was submitting to the interview voluntarily.

> Q "You are doing this voluntarily?"
>
> A "Yes, I am."
>
> Q "No one had made any promises of any kind to you have they?"
>
> A "No." (A. 27).

Additionally, during the initial part of the afternoon session, the attorney referred to the previous session which he had had with appellant earlier that day:

> Q "We spoke this morning, is that correct?"
>
> A "That is right."
>
> Q "And our conversation was tape recorded at that time as well?"
>
> A "That is correct."
>
> Q "That conversation was also recorded with your permission and consent, is that correct?"

A "That is correct." (A. 27).

Again, at the conclusion of the afternoon session, the attorney gave appellant an opportunity to add to what had been discussed:

Q "I haven't any other questions to ask. Do you have anything else you wish to add?"

A "No, I do not." (A. 40).

As an examination of the transcript of the interview reveals, (which appellant alleges he does not want circulated although he included it in the appendix, (appellant's brief, p. 29)) appellant was informed of the facts that appellee and its attorneys already knew relating to his activities with the developer defendants and he was shown the documentary proof in their possession. Thus, no unfair advantage was taken of appellant, since all of the statements made by him that morning related to matters of which appellee and its attorneys already had knowledge. (A. 205, 211-212). It should be stressed that appellant only admitted the commission of the acceptance of secret payments after he was referred to specific payments made to him.

Moreover, appellee's attorneys did not tell appellant that it was all right to sign the authorizations and that if he did not sign them they could obtain the information anyway. (A. 212-213; 207). The transcript of the interview reveals

exactly what was said:

> "I have also prepared certain authorizations which I'd like you to sign which will permit us to make certain inquiries that we may not be able to check. I'll show them to you and if it is all right I'd like you to sign them." (A. 26). (Emphasis supplied)

No final decision was made to fire appellant or serve him with a summons and complaint until after the results of the polygraph and the two interviews were discussed with appellee's executives. Only thereafter, it was decided that appellant should be served with process. (A. 216, 195).

When appellant was served he asked what those papers were. (A. 216). He was told that they were a summons and complaint and an order to show cause returnable the following Monday morning which sought relief against his property. (A. 216).

Appellant asked what all this meant and he was informed that he could not be given legal advice since appellant had interests adverse to appellee and appellant was urged to obtain an attorney. (A. 216).

When appellant was asked to sign an acknowledgment of service he asked whether or not he should do that without first obtaining an attorney as suggested. (A. 216). At that point, appellant was told that he could acknowledge receipt of service since his acknowledgment of receipt of service was only an indication that he had in fact received those papers on

that date. (A. 217). At no time was it suggested that appellant not obtain an attorney. (A. 217).

The foregoing establishes that appellant was not "subjected" to pressures (appellant's brief, p. 23); that no information was "extracted" from him (appellant's brief, p. 24); and that rather than his having been "prejudiced" by the interview, it was appellee that furnished him with the facts it had in its possession, while appellant lied and sought to rationalize those facts in a manner favorable to himself. Even the identity of his banks was known to appellee at the time that he deposited the Waits' checks in the very banks that he referred to since appellee had such checks with the cancellation stamps on the reverse side. (A. 83-94). This Court should take notice that appellee also had available the cancelled salary and expense reimbursement checks which it had issued to appellant during the course of his employment.

Appellant was employed by appellee from April 21, 1965 to January 31, 1975. (A. 120). During that period, he held various positions including Real Estate Negotiator Trainee, Real Estate Negotiator for the Central Region, and Real Estate Manager for that region. (A. 120). His aggregate compensation paid by appellee during the period of his employment was at least $232,681. (A. 120).

As set forth in the statement of Charles Head (A. 74-77) defendant Waits made payments to appellant in the latter part of 1967 and the early part of 1968; $5,000 for each lease commitment effected through appellant on behalf of appellee with the Waits corporation at Raceland Mall, Louisville, Kentucky; Westland Mall, Louisville, Kentucky; and Richmond Plaza Shopping Center, Richmond, Kentucky. Waits also furnished to appellant the use and possession of automobiles, together with a credit card for the purchase of gas and other automotive accessories.

As set forth on page one of the Head statement (A. 74), the Waits corporations paid appellant approximately $45,500 which appellant actively solicited from them. (A. 121). Payments made to appellant in excess of $35,000 are evidenced by the copies of checks annexed to the Kendrick affidavit and shown to appellant at the interview. (A. 83-94). (The dates, numbers and amounts of those checks are listed at A. 121).

The employee defendants, including appellant, who were charged with responsibility for negotiating complex and substantial leasing transactions, put their own selfish interests ahead of the duty of undivided loyalty which they owed appellee. Their cupidity made appellee a captive lessee for the developer defendants, the primary effect of which was to enrich the developer defendants and the employee defendants and to defraud appellee.

Appellant's Presence in New York
on January 31, 1975

Although appellant's brief repeatedly alleges that appellant was lured into New York on January 31, 1975 for the purpose of being interviewed and served with process (appellant's brief 9, 13, 17,), appellant conveniently neglects to inform this Court that appellee's motion to reargue the District Court's decision vacating service of process upon appellant (and for other relief) has been sub judice since June 2, 1975. A review of the District Court's decision (A. 245-251) makes it abundantly clear that the District Court overlooked the affidavits of James G. Kendrick, then Chairman of the Board of Directors and President of appellant (A. 182-186) and Herbert Robinson (A. 192-202 - see especially A. 194-196). The documentary evidence attached to Mr. Kendrick's affidavit establishes that because of the favorable results achieved at a Management Committee meeting held on Monday, January 27, 1975, Mr. Kendrick, on January 28, 1975, called another Management Committee meeting for Friday, January 31, 1975. (A. 183). This meeting was to be attended by all of the top executives of the Real Estate Department including all of appellee's real estate negotiators. (A. 220). Mr. Kendrick's diary confirms the January 27, 1975 meeting (A. 221), and that he called a similar meeting for January 31, 1975. (A. 222, 183-184). The main purpose of such meeting was to review all projected store closings and seek the advice of appellee's real estate people concerning the viability of some of the smaller stores in order to avoid closing them. (A. 183). Such meeting was called for Friday, the usual meeting

day for the Real Estate Committee. Friday, January 31, 1975 also coincided with the closing of appellee's fiscal year. (A. 183).[8]

The affidavit of Mr. Kendrick which was evidently overlooked by the District Court unequivocally states that appellant's accusations that the meeting was set up to "lure" him into New York for service of process is untrue. (A. 184). Appellee did not tailor its business operations to the start of a lawsuit. (A. 184).

The foregoing was confirmed in the Robinson affidavit (A. 193-195) which makes clear that when appellee's attorneys learned of the scheduled meeting they suggested that interviews be held on that date with the hope that at least one of the three employee defendants would make full and frank disclosure plus an agreement to make restitution.

Accordingly, appellant was not lured into New York on January 31, 1975 for the purpose of being interviewed or served with process or otherwise. In fact, should the District Court deny appellee's motion to reargue, an appeal will be taken from that final order.

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[8]Annexed to the Kendrick affidavit were copies of the call of the January 31, 1975 meeting (A. 220) and the diary entries kept in the regular course of business. The diary notation for the January 31, 1975 meeting read:

> "Special Meeting
> Re: new approach
> to store closings
> Christensen and Regional Negotiators
> and Management Committee" (A. 184)

Appellant also misconstrues the language of the Kruger affidavit submitted in support of obtaining the Rule 4 order permitting service of process by persons other than the United States Marshal. Such affidavit makes clear that the thrust of the need for the order was based upon appellee's hope that it could attach assets of defendants who apparently had received large sums of secret payments in violation of their fiduciary duties to appellee before such defendants were able to dispose of or conceal their fraudulent gains. As set forth in such affidavit:

> "...When confronted with plaintiff's allegations, they will undoubtedly leave New York as quickly as possible, take steps to secrete their illgotten gains and cover their tracks. Simultaneously with the service of process, all three defendants will be served with an order to show cause, containing, if granted, a temporary restraining order, to attach their property and enjoin the transfer of their property."
>
> "5. Mavis Christensen, Waits and Umbaugh will, when apprised of plaintiff's action, will also attempt to cover their tracks and transfer their property, to the extent possible." (A. 102).

Service of process was the last of plaintiff's considerations since plaintiff did not then and does not now doubt that New York has jurisdiction over these defendants under New York's long arm statute.

The Seriousness of Appellant's
Motion and Unfounded Accusations

Appellant, a disloyal fiduciary who thinks nothing of making improper and inflammatory remarks in an effort to save his

hide and who engages in half-truths and unsupported innuendos in briefs to this Court, should not be permitted to mar an attorney and law firm which have always enjoyed reputations of high repute. It is beyond dispute that the granting of appellant's motion would irreparably injure both the attorney involved as well as the law firm in addition to the substantial damage that could be inflicted upon appellee. Appellant should not be permitted to drag down those with whom he came in contact.

It is respectfully requested that this Court take judicial notice of Martindale-Hubbell Law Directory, Vol. 4 (1975). Appellant's law firm enjoys an a-v rating (see page 168) as do all of its partners (with the exception of Allan J. Kirschner who enjoys a b-v rating. see page 149, - an a-v rating is only available to attorneys who are admitted to practice for ten years; Mr. Kirschner has only been admitted for nine years).[9]

Shortly after this action was commenced, District Judge Brieant instructed appellee's counsel to expeditiously pursue this matter and to commence and complete depositions and disclosure and

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[9]The attorney who conducted the interview is 33 years old, was admitted to practice in December, 1966 and is admitted to this Court as well as to the Southern, Eastern and Northern Districts of New York. He received his law degree from New York University in 1966 and was then a judicial clerk to the late Hon. Benjamin J. Rabin of the Appellate Division, First Judicial Department. Such attorney is also a member of the Association of the Bar of the City of New York, American Bar Association, New York State Bar Association, New York Trial Lawyers Association, New York County Lawyers Association, and was a member of the latter's Judiciary Committee from 1971 through 1973. In addition, said attorney has lectured to students at Adelphi University Paralegal Program on commercial litigation and is sitting as a judge in National Moot Court competition.

not to grant a request for adjournments of depositions which were merely for the convenience of attorneys. Subsequently, the District Court stated that he intended to consider this matter "preferred" and he was considering having disclosure supervised by a magistrate.[10]

Accordingly, appellee, in order to complete disclosure as expeditiously as possible and desiring to discover the full extent and full implications of defendants' defalcations, obtained orders from the District Court permitting the taking of depositions prior to the expiration of thirty (30) days from the commencement of the action. (A. 312-313). Appellee also served subpoenas upon certain of defendants' banks as non-party witnesses.

Initially appellant moved to vacate the order to take his deposition upon omnibus grounds. At the hearing of that motion on February 24, 1975, the District Court stated that he was not persuaded by appellant's argument;[11] but upon appellant's attorney's representation that he was making a "substantial" motion concerning subject matter and personal jurisdiction and venue[12] the District Court stayed the taking of such depositions. The Court warned appellant that should he deny the motion defendants might be ordered "to go forward very promptly".[13]

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[10] See transcript of record of proceedings dated February 24, 1975, p. 22, lines 4-12.

[11] Id. p. 16 line 10, p. 25 line 8; p. 26 line 2; p. 27 line 19.

[12] Id, p. 5 line 15; pp. 12-13.

[13] Id, p. 41 lines 7-8.

No mention was made by appellant that any other ground existed for staying the taking of those depositions.

However, on March 19, 1975, during the arguments of the motion to dismiss this action, appellant's attorneys requested an adjournment of the previously noticed depositions of appellant's banks on the ground that he would be moving to disqualify appellee's attorneys. Although appellant's attorneys were representing appellant since at least February 14, 1975, no mention was made of such alleged impropriety or of any other ground to delay or postpone the taking of appellant's or his banks' depositions.

By virtue of appellant's representations that such a motion would be made the District Court continued to stay disclosure but again admonished appellant's attorney that should the motion be denied, depositions would be scheduled on the "next day".[14]

Although the District Court denied appellant's motion, the stay of disclosure has remained in effect[15] and much valuable time has been lost.

The District Court continued the attachment for a period of twenty (20) days within which plaintiff was permitted

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[14] See transcript of record of proceedings dated March 19, 1975, p. 64, lines 5-6.

[15] R. 335; see transcripts of record of proceedings: dated April 14, 1975, p. 25, lines 14-21; dated June 23, 1975, p. 14, line 14; dated July 31, 1975, p. 17, line 16.

to serve and file an amended complaint and thereafter if such complaint be filed, and also continued the attachments pending the final determination of any appeals taken from the order of the District Court. The District Court granted plaintiff leave to serve an amended complaint within twenty (20) days. Appellee through the same firm of attorneys which originally represented it in this litigation and which is now representing it on this appeal, timely filed the amended complaint. (A. 337-369).

Service of the amended complaint has been effected upon appellant pursuant to Rule 4, Federal Rules of Civil Procedure and New York's long arm statute. However, to accomplish this it was necessary to obtain an order permitting substituted service, since the U.S. Marshal was unable to locate appellant personally, despite the fact that his attorney continues to represent him on this appeal and in the proceedings below.

Thus, appellant's drastic assertions, which postponed the taking of the depositions of appellant and appellant's banks on alleged grounds which must have been known to appellant's attorneys from the day they commenced representation of appellant, must be viewed as a further attempt to impede the resolution of this matter and to permit appellant to dispose of or secrete his assets.

Appellant's Attempts to Confuse the Issues by Referring to News Articles Which Appeared in the Press

Appellant makes a blatant attempt to prejudice this

Court by the use of inflammatory language with reference to press reports of appellee's commencement of this litigation, even going so far as to build up a file by throwing in copies of press discussions concerning appellee's well known financial problems which were printed long before this action began (A. 161 - October 19, 1974; A. 159-160 - December 15, 1974), as well as by adding copies of media reports which were printed well after the institution of this litigation. (A. 162-164 - February 24, 1975). The article in Women's Wear Daily obviously followed the New York Times' report of February 1, 1975 and is just as obviously based upon it and the papers filed in Court. (A. 150). Additionally, there was no press release - the record makes it abundantly clear that there was one meeting only, and that with the reporter from the New York Times, and that such meeting was held in order to disabuse stockholders, creditors and vendors of any notion that the discharge of three high level executives reflected a further deterioration in appellee's financial affairs.[16] Appellee did not "burst" into the headlines; there were no press conference "announcements"; there was nothing "bizarre" about the New York Times' report as to what had happened (appellant's brief, pp. 5, 6, 26) and there was nothing "bizarre" about the New York Times interview with Mr. Robinson. Self-serving statements and charges by or on behalf of appellant do not constitute facts. Appellant's

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[16] The deposition of Herbert Robinson, a senior partner of the law firm representing appellee, was conducted on April 18, 1975 pursuant to notice, subpoena and the direction of the District Court. A copy of p. 15 of the transcript of that deposition is appended to this brief for the convenience of the Court.

brief persists in the prior distortions of the relevant facts, although they were correctly set forth by Mr. Kirschner (A. 209-219) and Mr. Robinson. (A. 192-202).[17]

Summation

The totality of circumstances involved in this particular litigation, legally, ethically and factually, justify appellee's procedure. It is no secret that white collar crime, as well as crime generally, is on the increase in our country. Management must have the right to interview its high level fiduciaries[18] concerning corrupt dealings when those charges are supported by substantial documentation. When, as here, the corporation involved has its head and heart in New York and its limbs and other organs scattered across the length and breadth of the United States, the only appropriate place for such interview is in New York, not separately in New York, Georgia, Illinois, Kentucky and elsewhere. Appellee is a unitary entity and was dealt

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[17] Significantly, the New York Times interview does not mention any clients despite plaintiff's counsels' representation of major corporations in matters of the kind discussed over a period of many years. (A. 200-201). See, for example, Zale Jewelry Co. v. Laine, 37 Misc. 2d 39, 236 N.Y.S. 2d 995 (Sup. Ct., N.Y. County, 1962); Montgomery Ward & Co. v. Weber, 7 Misc. 2d 465, 162 N.Y.S. 2d 744 (Sup. Ct., N.Y. County, 1957); Sears Roebuck and Co. v. Kelly, 1 Misc. 2d 624, 149 N.Y.S. 2d 133 (Sup. Ct., N.Y. County, 1956), among the reported cases, as well as Melrose Flower Co. v. J. M. Fields, Inc., 73 Civ. 888 (M.E.F.) Opinion No. 41681 (S.D.N.Y., Jan. 9, 1975) tried recently by Mr. Kirschner. As set forth by Mr. Kirschner and as testified to by Mr. Robinson, no mention whatsoever was made of this litigation during the interview with the Times reporter.

[18] Comment, The Obligation of a High-Level Employee to His Former Employer: The Standard Brands Case, 29 U. of Chi. L. Rev. 339-354 (1962); Jacobs, Business Ethics and the Law: Obligations of a Corporate Executive, 28 The Business Lawyer 1063 at 1069-1071 (1973).

with and regarded as such by the Federal government, its employees, creditors, vendors and stockholders. The harm suffered by appellee because of any depredations by its executives is felt most sharply at its center - New York. (see A. 244). Top corporate management having jurisdiction over and supervision of executives are headquartered in and work out of New York. These very executives not only report to New York from a distance, but meet in New York frequently. (A. 230-231).

> "To ignore white-collar crime is to undercut the integrity of our society, just as we ignore the safety of society when we fail to cope with common crime. To delay or postpone action is an abdication of law enforcement responsibility and not an ordering of priorities."
>
> * * *
>
> ". . . the curbing of white-collar criminal activities, by contributing to the integrity of our economic and social transactions, may free large resources for socially and economically productive purposes." The Nature, Impact and Prosecution of White Collar Crime, U.S. Department of Justice, Law Enforcement Assistance Administration, May 1970, p. 1.

Accordingly, appellee did not engage in any impropriety on January 31, 1975 or any other time. The only improper acts were committed by appellant and the other executives who violated their duty of loyalty to appellee. Accordingly, the order of the District Court denying appellant's motion to dismiss the action or disqualify appellee's counsel should be affirmed.

ARGUMENT

POINT I

WHERE APPELLANT, A HIGH LEVEL FIDUCIARY, WAS NOT REPRESENTED BY AN ATTORNEY, THE DISTRICT COURT PROPERLY DENIED APPELLANT'S MOTION TO DISQUALIFY OR DISMISS THIS ACTION

Appellee's Attorneys Did Not Violate Disciplinary Rule 7-104(A)(1) Since Appellant Was Not Represented By An Attorney At The Time Of The Interview

A reading of DR 7-104(A) establishes that the allegation that appellee's attorney violated Disciplinary Rule 7-104(A) of the Code of Professional Responsibility because of the interview that took place on January 31, 1975 is totally unfounded:

> "DR 7-104. Communicating With One of Adverse Interest
>
> (A) During the course of his representation of a client a lawyer shall not:
>
> (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.
>
> (2) Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in

> conflict with the interests of his client." Code of Professional Responsibility, N.Y. Judiciary Law, (McKinney Supplement 1974-1975).

Determination of the propriety of the conduct of the attorneys appearing before it is within the discretion of the District Court. The determination by the District Court of such matters should not be reversed by the Court of Appeals unless the District Court is found to have abused its discretion. Richardson v. Hamilton International Corporation, 469 F.2d 1382 (3rd Cir. 1972), cert. den. 411 U.S. 986 (1973); Greene v. Singer, 461 F.2d 242 (3d Cir. 1972), cert. den. 409 U.S. 848 (1972); Universal Athletic Sales Co. v. American Gym, R. & A. E. Corp., Inc., 357 F. Supp. 905 (W.D. Pa. 1973).

Before an attorney can be held to have violated DR 7-104 (A) (1) he must be shown to have communicated with a party he knows to be represented by a lawyer in that matter. Here, it is undisputed that appellant at the time he met with appellee's attorneys did not have an attorney representing him:

> "THE COURT: These people had no counsel with respect to this incipient controversy with Grant, did they?
>
> MR. LAYTON: At that time, that's right. But...
>
> THE COURT: It isn't a case of going behind the adverse attorney's back?
>
> MR. LAYTON: That's right." (A. 275).

Similarly, no claim is made that appellee's attorneys, whether or not such belief was correct, knew or believed that appellant was represented by an attorney and nevertheless proceeded to interview him. In fact, appellee's attorneys have stated by affidavit that:

> "At the time of the interviews, we knew of no lawyer representing any one of the real estate executives." (A. 196).

DR 7-104 (A) (1) prohibits communication by an attorney with a party he knows to be represented by a lawyer. It does not prohibit communications by an attorney with an adverse party. The determining factor in deciding whether the communication is proper is whether the party with whom the lawyer communicates is in fact represented by counsel. Such has clearly been the construction placed upon DR 7-104, and former Canon 9 of the Canons of Professional Ethics, the predecessor to DR 7-104. Canon 9 stated in relevant part:

> "A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel." (Emphasis supplied) Canon 9 Canons of Professional Ethics, N.Y. Judiciary Law (McKinney 1968).

The District Court properly realized the import of DR 7-104 (A) (1):

"The purpose of DR 7-194(A)(1) is to prevent the attorney for one party from approaching the client of another without the consent of the lawyer representing the person so approached. This is to prevent unseemly professional friction arising between the two attorneys. The attorney for one adverse party may consent to having the attorney for the other party speak to his client. The rule contemplates this. Here, Haines had no attorney, and accordingly the rule was not violated." (A. 255).

In arriving at this conclusion, the District Court cited Informal Opinion No. 908, the Standing Committee on Professional Ethics of the American Bar Association (February 24, 1966) which states:

"Attorney Interviewing and Taking A Statement From An Adverse Party Who He May Reasonably Expect Will Retain Counsel But Is Not Yet Represented.

Upon the above, we do not feel that there is anything unethical in the attorney for a potential plaintiff interviewing the potential defendant and taking his statement, if the attorney advises the potential defendant witness that he is conducting the interview and attempting to take the statement in his position as attorney for the claimant."

The District Court found that in the instant case the attorneys for appellee had fully disclosed their role and function.

"There was no deception practiced by the attorneys insofar as concerns their character and the nature of their representation. They disclosed immediately that they were members of a law firm which had been retained by Grant to look into problems affecting certain of Grant's commercial dealings with shopping center developers and landlords. The identity of Kelly, Grant's house counsel, was apparently known to movant. At the beginning the members of the law firm present were introduced and identified. Movant was informed that these attorneys were representing plaintiff and investigating claims of their client which for simplicity may be characterized as suggestions or charges of commercial bribery." (A. 254).

Indeed, the record amply supports these findings. Appellant's counsel stated at the hearing before Judge Brieant on April 14, 1975:

"THE COURT: Am I correct in understanding that since this conference began your client knew or was directly informed these people were attorneys for Grant and that they were in an adversary position to your client to the extent that they were charging your client with a crime or at least highly immoral conduct with respect to his fiduciary obligations to Grant as an employee? That seemed clear at the outset, didn't it?

MR. LAYTON: It became clear they were investigating this conduct and that it was an adversary circumstance.

THE COURT: And that they thought he had done something wrong?

MR. LAYTON: Very wrong, yes." (A. 272-273).

The affidavits submitted below by appellee's General Counsel and Vice President and attorneys in this litigation confirm this. Thus, Mr. Kelly stated:

> "I was present and participated with Mr. Kirschner during the interview of Haines at Grant's offices on January 31, 1975. Haines and I have known each other for a number of years. He knew that I am General Counsel for Grant. Mr. Kirschner was introduced as an outside attorney for Grant and Mr. Kirschner stated that he was not an employee of Grant, but one of Grant's outside counsel who was retained in connection with certain irregularities concerning Grant's real estate department which had recently come to the attention of Grant's management." (A. 204).

Similarly, Mr. Kirschner in his affidavit stated:

> "When, at approximately 9:30 A.M., January 31, 1975, Haines was brought into the office in which I was sitting, I was introduced to him as one of Grant's lawyers. I thereupon explained that I was not in the employ of Grant but was with the firm retained by Grant to investigate certain irregularities which occurred in Grant's real estate department which had recently come to the attention of Grant's management." (A. 210).

Opinions of bar associations' ethical committees clearly support, as does Informal Opinion No. 908, supra, the premise that attorneys may communicate with parties of adverse interest provided the party is not represented by

counsel.

Opinion No. 533, Opinions On Professional Ethics, The Association of the Bar of the City of New York (March 6, 1940) deals with a question where "X" was the attorney of record for the defendant in an action pending on the court calendar. The plaintiff's attorney had been disbarred and plaintiff was not represented by counsel. The question was:

> "Under the circumstances, is it professionally proper for X or a member of his office to interview the plaintiff in an endeavor to arrange for a settlement of the action?"

The committee stated:

> "The plaintiff is not represented by counsel in the action since the disbarment of his attorney. It follows that the first sentence of the Canon quoted is not applicable, and X, the attorney for the defendant, must be governed by the second sentence thereof."

The second sentence of former Canon 9 referred to by the Committee applied to communications between attorneys and parties not represented by counsel.[19] Thus, the Canon contemplates that an attorney representing one party may communicate with an adverse party who is not represented.

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[19] The second sentence of former Canon 9, stated:

> "It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law."

Opinion No. 331, Opinions on Professional Ethics, The Association of The Bar (February 28, 1935) makes clear that it is proper for an attorney to send an investigator to interview an employee of a defendant who was about to be sued in a negligence action. The opinion further states that it makes no difference whether or not the employee will be a defendant. The Committee also stated that whether or not the question refers to a negligence action or some other type of action does not affect the answer.

Opinion No. 42, Opinions on Professional Ethics, The Association of The Bar of The City of New York (June 4, 1926) makes clear that it is proper for an attorney to interview a party who has victimized his client. In fact, the committee stated:

> "It would seem to be the inquirer's [attorney] duty to do so." [Evidently referring to an attorney's duty to be zealous on behalf of his client.]

Opinion No. 101, Opinions on Professional Ethics, The Association of The Bar of The City of New York (1928-1929) states that it is not professionally improper for an attorney for a company to hire an investigator to seek to elicit the facts of a claim made by a party not represented by counsel who has demanded money damages from the attorney's client, where similar claims in the client's industry have been unfounded or excessive.

Formal Opinion No. 102, Opinions of the Committee on Professional Ethics, American Bar Association, (December 15, 1933), makes clear that it is proper for an attorney representing an employer in a workmen's compensation dispute to prepare settlement papers between the employer and employee where the employee is not represented by an attorney, as long as the attorney does not advise or mislead the employee as to the law and the court called upon to approve the settlement is advised that the employee is not represented.

Informal Opinion No, 670, the Standing Committee on Professional Ethics of the American Bar Association (June 17, 1973) dealt with the question whether it is proper for a plaintiff's attorney who has not placed a negligence matter in suit, to make inquiry, either personally or through a private investigator, of the prospective defendant as to the limits of his liability insurance coverage. The Committee saw "no objection to inquiry of this type, provided that the person of whom it is made is not known to be represented by an attorney." Id.

In Informal Opinion No. 1103 the Standing Committee on Professional Ethics of the American Bar Association (September 22, 1969) dealt with the problem of plaintiff's attorney

contacting defendant directly where the defense attorney informed plaintiff's attorney that his representation of defendant is limited to the policy limits and the suit is for an amount greater than the policy limits. The Standing Committee held that it was not improper for the plaintiff's attorney to write the defendant directly, with copy to the defendant's liability carrier's attorney stating that the liability carrier's attorney had advised the plaintiff's attorney that he did not represent the defendant insofar as that defendant's excess exposure was concerned and state to defendant that he would be glad to discuss with defendant's personal attorney (if the defendant were to secure one) the matter of defendant's liability over and above the policy limits. The Committee founded its opinion upon the finding "that as to the excess liability, there is no representation." Id.

In Informal Opinion No. 1103, the Committee distinguished an earlier Informal Opinion (No. 570, August 23, 1962) which on similar facts found the communication to be violative of Canon 9 on the ground that "... in that case it was not clear, that the insurer's counsel was not representing the defendant as to the excess liability."

The foregoing opinions establish that it is the fact of the party's actual representation by counsel which determines the propriety of the attorney's communication with the adverse party. Contrary to the wholly unsupported[20] argument in appellant's brief (pp. 18-22), that the question of retention of counsel is irrelevant in determining a violation of Disciplinary Rule 7-104(A), the absence of representation is the substantive factor to be determined on the issue of compliance with DR 7-104. This is confirmed by review of the ethical opinions which hold particular conduct professionally improper where an attorney contacted a party who was represented by counsel. See, e.g. Informal Opinion No. 425 (March 28, 1961), Informal Opinion No. 1149 (May 14, 1970), Formal Opinion No. 108 (March 10, 1934) and Informal Decision No. 570 (August 23, 1962), the Standing Committee on Professional Ethics, American Bar Association.

Similarly, review of disciplinary proceedings brought against attorneys reveals that the party contacted had been represented by an attorney. In Re Edward Kent, 39 N.J. 114 (1963)

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[20]Appellant cites no case directly in support of his argument that retention of counsel is irrelevant. Both Ceramco v. Lee Pharmaceuticals, 510 F.2d 268 (2d Cir. 1975); and Zeller v. Bogue Electric Manufacturing Corporation, 71 Civ. 5502, Opinion #42038 (S.D.N.Y., March 13, 1975), discussed by appellant involved cases where the parties were represented by counsel and hence are distinguishable from the instant case. (See discussion infra.)

(cited at p. 17 of appellant's brief). See e.g. Mitton v. State Bar of California, 78 Cal. 649, 455 P. 2d 753 (1969); Turner v. State, 36 Cal. 2d 155, 222 P. 2d 857 (1950); In Re Atwell, 115 S.W. 2d 527 (Ct. of Appeals, Missouri, 1938).

Whether or not the lawsuit has been technically commenced is not determinative of the issue of compliance with DR 7-104. In Informal Opinions No. 670, and 908, discussed supra, pp. 38, 33, no lawsuit had yet been commenced. Opinion No. 533 of the Opinions of Professional Ethics of The Association of the Bar of the City of New York, supra, p.36 , involved a situation where the lawsuit had been commenced, but the question of whether the defendant's attorney could communicate with the plaintiff was governed by the second sentence of former Canon 9. Similarly, Informal Opinion 1103, supra, p.38, involved a situation where a lawsuit had been commenced and it was held proper for plaintiff's attorney to contact defendant directly where the defense attorney informed plaintiff's attorney that his representation of defendant was limited to the coverage in the policy and the suit was for an amount greater than such coverage. Indeed, Informal Opinion No. 425, Standing Committee on Professional Ethics, American Bar Association (March 28, 1961) dealt with the situation of communications with an adverse party after the rendering of a final decree

and the Committee expressly stated "the question therefore is whether a party should be considered as represented by counsel under the circumstances." Id. Similarly in Informal Decision No. 827 (April 26, 1965) the American Bar Association's Standing Committee on Professional Ethics based its determination on the fact that the legal relationship between the defendant and his attorney had terminated, and accordingly concluded that there was no impropriety in plaintiff's attorneys dealing directly with the defendant." Id. Thus, the fact that the lawsuit against appellant in the instant case may have been technically initiated by filing of the papers in Court, is not governing on the issue of professional propriety under DR 7-104. Were that the critical element, the conduct of attorneys practising in New York State courts, who communicated with the adverse party prior to service of process[21] would be ethically proper, while the same attorneys, also engaging in the same conduct before service in Federal actions, would be acting improperly. Such result would lead to innumerable problems for the members of the Bar, and do much to destroy what little certainty there is in an already imprecise area of law.

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[21] In New York practice there is no filing requirement prior to service of process.

Lumbermen's Mutual Casualty Company v. Chapman, 269 F.2d 478 (4th Cir. 1959) illustrates that the crucial factor in determining whether an attorney has violated the Canons of Ethics by communicating with a party of adverse interest, is the question of actual representation of that party by an attorney. Lumbermen's involved an action against an automobile liability insurer for satisfaction of a judgment secured by the insured's [illegible]-in-law in a state court personal injury action brought against the insured. The insurance company plead as a defense the failure of the insured to cooperate in defense of the personal injury action. Plaintiff's attorney had interviewed the insured on two separate occasions. The first interview occurred prior to the institution of any action against the insured and prior to the time when either the insured or the insurer had retained counsel. The court stated "there was thus no impropriety" in regard to that meeting. Id, 269 F.2d 481. The second meeting occurred after counsel had been retained and accordingly was held to be improper.

The cases relied upon by appellant to support a finding of a violation of DR 7-104 (A) are distinguishable from the present case. In Ceramco v. Lee Pharmaceuticals, 510

F.2d 268 (2nd Cir. 1975) the attorney with knowledge that defendant was represented by counsel, made a telephone call to defendant's order department in California, and without "identifying himself or alluding to his capacity as opposing counsel" requested the names of distributors of defendant's products within the Eastern District of New York for the purpose of establishing a basis for jurisdiction against defendant and venue in that District. However, even though the party who had been contacted had retained counsel, this Court did not disqualify the attorney. In fact, the concurring opinion stated that his action was not improper.

Ceramco, unlike the present case involved deception as to the identity of the attorney and of his adverse status. As the District Court stated in distinguishing Ceramco from the instant case:

> "... Ceramco ... involved a deception as to the adverse status of the attorney ... Implicit was a false representation that the caller was a customer who wished to buy the defendant's product, rather than a lawyer seeking to locate an outlet in that district for the purpose of founding venue in a trademark infringement case.
>
> In the instant case, there was no express or implied misrepresentation by counsel as to the fact that they were attorneys and that they were representing the adverse interest of Haines' employer in an investigation of possible misconduct of Haines and others in plaintiff's real estate department." (A. 258-9).

The District Court's distinguishing Ceramco from the instant case was correct. Since appellee's attorneys immediately, clearly and emphatically apprised appellant of the adversary nature of the interview, appellant's motion was properly denied.

Similarly, in Zeller v. Bogue Electric Manufacturing Corp., 71 Civ. 5502, Opinion No. 42038 (S.D.N.Y., March 13, 1975) the attorney conducted an interview with an individual defendant whom he knew to be represented during several years of active litigation. The court found:

> "The fact is that Powers spoke to Guttenberg without permission of Guttenberg's counsel before any dismissal was sought." Id, p.5

Judge Brieant interpreted Zeller: "The misconduct in Zeller was squarely within the black letter of the disciplinary rule." (A. 259). Furthermore the court's determination to disqualify the plaintiff's attorney in Zeller (but not to dismiss the action) appears to have been motivated largely by the fact that the attorney induced a belief that the action would be dismissed against defendant Guttenberg and said attorney might thereafter act under the cloud of a conflict of interest with respect to his undertaking to dismiss the action against Guttenberg regardless of the adverse impact such dismissal would have upon the interest of plaintiff's stockholders in that derivative action.

Appellee's Attorneys Did Not Violate Disciplinary Rule 7-104 (A) (2).

> "(A) During the course of his representation of a client, a lawyer shall not:
>
> * * *
>
> (a) give advice to a person who is not represented by a lawyer other than the advice to secure counsel if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client." Code of Professional Responsibility, New York Judiciary Law, (McKinney, 1974-75 Supplement).

No violation of this subsection can be found absent a finding that the attorney gave advice other than the advice to secure counsel. Parenthetically, the attorney is not compelled to advise the party to secure counsel and his failure to do so cannot be held a violation of DR 7-104 (A) (2). Indeed, a non-governmental plaintiff in a civil litigation has no duty to inform his adversary of such adversary's right to counsel.

In O'Connor v. C.I.R., 412 F.2d 304 (2nd Cir. 1969), the Court held that non-custodial admissions by a defendant to an Internal Revenue agent were fully admissible even though the defendant did not receive Miranda[22] type warnings and was not specifically advised of his right to counsel:

> "With respect to the first point, it is well settled in this Circuit that non-custodial questioning by Internal Revenue Agents is not subject to the Miranda requirements, United States v. Dawson, 400

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[22] Miranda v. Arizona, 384 U.S. 436 (1966)

F.2d 194, 206 (2 Cir. 1968), cert. den. 393 U.S. 1023, 89 S. Ct. 632, 21 L.Ed. 2d 567 (1969). As this is so in a criminal case, there can be no doubt that it is so in the present case which is civil." Id, 412 F.2d 304, 313.

Accord: Diric v. Immigration and Naturalization Service 400 F.2d 658 (9th Cir. 1968), reaching an identical holding with respect to admissions made to an Immigration officer which were introduced at a deportation hearing. Since in the present case no governmental authority at all was involved and since any admissions that may have occurred would relate to a civil proceeding, neither appellee nor its attorneys were compelled to advise appellant to obtain counsel.

Similarly, in Kent v. Hardin, 425 F.2d 1346 (5th Cir. 1970), traders in grain futures were held to have no right to be informed of the nature of the inquiry and questions asked by a governmental investigator with respect to alleged violations of the statute and orders of the Commodity Exchange Commission establishing limits on positions in trading, even though the proceeding involved a penalty or forfeiture. The Court held that because the investigation was non-custodial, Miranda warnings were not required. Id, 425 F.2d 1346, 1349.

Examination of the record below reveals that at no time did appellee's attorneys give appellant any legal advice whatsoever. In fact the attorney expressly informed appellant that he could not give him a legal opinion since appellant had interests adverse to his client and appellant was urged to obtain an attorney. (A. 216).

Appellant recklessly charges that appellee's counsel suggested that he had no need to have an attorney present. (appellant's brief p. 20). Not only is this blatant misrepresentation totally unsupported by any reference to the record, but examination of the record reveals how baseless the accusation is. Appellant did not once ask appellee's attorneys whether or not he should have an attorney present. In fact he signed a statement that he was told of his right to an attorney. (A. 190, 224). Moreover, appellee's attorneys did not state, hint or infer that an attorney was not necessary or that appellant would not be permitted to have an attorney should he so desire. (A. 210-211).

In his affidavit below, appellant swore that:

> "... he [the attorney] handed me a legal document which he said was an authorization or waiver by me for him or Grant to verify whether I had any governmental securities in my possession. I did not exactly understand the nature of the document. He told me that it was alright for me to sign it. I told him that I wanted to have an attorney advise me before signing any such document." (A. 176-177).

The transcript of the interview reveals clearly that appellant lied to the District Court since the attorney stated:

> "I also have prepared certain authorizations which I'd like you to sign which will permit us to make certain inquiries that we may not be able to check. I'll show them to you and if it's alright, I'd like you to sign them." (A.26).

The affidavit of Hale Detweiler (A. 190), the Robinson affidavit (A. 197) and the Kirschner affidavit (A. 213),

establish that appellant was expressly informed of his right to have an attorney present when he took the polygraph examination. However, appellant did not make the slightest attempt to obtain an attorney, nor did he request that he be permitted the opportunity to obtain an attorney. A copy of the agreement signed by appellant prior to his taking the polygraph expressly acknowledges:

> "I have been told of my rights to consult a lawyer before taking this test."
> (A. 223)

Appellant did not so choose. In fact, appellant was free at all times to refuse to talk, to get up and leave or to take any other action he desired. (A. 197).

Appellant argues that appellee's attorneys acted improperly by not disclosing that a complaint had already been filed in the District Court. The District Court properly found that failure to disclose did not justify disqualification or dismissal. There is no affirmative duty placed upon an attorney to disclose to the potential adverse party the commencement of a lawsuit or the intention to commence a lawsuit. Certainly such a failure to disclose cannot support a finding of a breach of DR 7-104.

Appellant argues that had he been informed of the lawsuit he would have gotten an attorney. There can be no doubt, however, that appellant knew he was being confronted by attorneys retained by appellee with allegations of very serious wrongdoing.

Certainly, if appellant were inclined to obtain an attorney to advise him, he had sufficient warning to do so from the circumstances and the nature of the facts immediately imparted to him as well as from the explicit statement of his right to an attorney prior to the polygraph examination.

The filing of the complaint cannot be construed as a representation that the summons and complaint will definitely be served on each defendant. Rule 11 of the Federal Rules of Civil Procedure (West, 1960) provides:

> "...The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information and belief, there is good ground to support it; and that it is not interposed for delay."

The attorney does not certify that he will effect service. If a would-be defendant were to admit liability and agree to make restitution there might well be no need to effecting service. Thus, there is no impropriety on the part of an attorney by not serving process under those circumstances.

However, the District Court did not find there was such an act of misleading. Rather, Judge Brieant labeled the conduct an "apparent attempt to mislead" (A. 256). However, even given this finding, Judge Brieant found that it did not

rise to a level which would justify disqualification of the attorneys or depriving Grant of such causes of action as it may have against movant." (A. 258).

Former Canon 9, supra, p. 32 , cautioned attorneys to "... avoid everything that may tend to mislead a party not represented by counsel..." Appellee and its attorneys squarely informed appellant of the adversary nature of the interview. Certainly, no finding of a violation of DR 7-104 should be based on a claimed act of misleading absent a clear showing that there indeed was such an act. Here appellant urges that the misleading was in encouraging appellant to talk further by being misled into thinking that he could clear himself and keep his job (appellant's brief, p. 10). However, the record establishes that other employees refused to be interviewed or to submit to a polygraph, and that they retained their job. (A. 198-199).

Moreover, the record does not even support the finding of an apparent attempt to mislead. Appellant clearly acknowledged during his interview that no promises of any kind were made to him. (A. 27). The quotation from the interview cited by Judge Brieant as supporting the finding of "an apparent attempt to mislead" (A. 256) shows that all the attorney said was "we'd like to be able to clear your name from this if that's possible" (emphasis supplied). There were no assurances or promises given.

In fact, that statement was the truth. The affidavits submitted below show that had appellant fully cooperated and honestly admitted the acts of bribery and corruption and made arrangements for restitution, service of process would not have been made. (A. 195, 218).

It was error to find that this possibility did not exist, since such finding could not be based upon a review of affidavits alone. Such a conclusion can only be found after an evidentiary hear[illegible] which the participating attorneys, appellant and appellee would be called to testify. There was no such hearing, the offer to have such hearing was declined by appellant (A.272) and appellant offers no sworn statement as to his knowledge that the possibility that service would not be effected did not exist.

In his affidavit below appellant swore:

> "During the course of the events described above that took place on January 31, 1975, I was continually given the impression by Messrs. Kirschner and Kelly that my continued cooperation, statements, admissions, responses, subjection to the lie detector test, all were in my best interest in continuing my employment with Grant and that the above procedures and information were required simply to clear up a potential misunderstanding." (A. 179).

It is hard to imagine how appellant could be given the impression that the confrontation to which he was a participant was required "simply to clear up a potential misunderstanding". Indeed, the District Court found:

> "It was clear to Haines at all times that the attorneys were representing an interest adverse to him; they were charging him with a serious breach of fiduciary duty, and indeed, with criminal conduct." (A. 255)

Appellant's attorney admitted:

> "It became clear they were investigating this conduct and that it was an adversary circumstance.
>
> THE COURT: And that they thought he had done something wrong?
>
> MR. LAYTON: Very wrong, yes." (A. 272-273).

In sum, before an act of misleading could be established, absent a clear express misrepresentation which the District Court found did not occur (A. 254, 258-259), a fact finding hearing would have been required. Absent such live testimony, no finding could have been made below or, indeed, by this Court that there was the commission of any misleading act. Cf., Croley v. Matson Navigation Company, 434 F.2d 73, 77 (5th Cir. 1970); Ross v. John's Bargain Stores Corporation, 464 F.2d 111 (5th Cir. 1972).

Appellant Has Suffered And Will Suffer No Prejudice From The Conduct of Appellee's Counsel Which Justifies The Drastic Relief Requested.

Appellant claims that the conduct of appellee's attorneys in interviewing him has prejudiced him in a "substantial and continuing manner." (appellant's brief, p. 22). As is readily apparent from a review of the record, there is no basis for a finding of such prejudice.

The interview was conducted during two sessions; the first, in the morning of January 31, 1975, lasting approximately thirty (30) minutes (A. 210), the second, in the afternoon, lasting approximately thirty (30) to forty-five (45) minutes (A. 214). A reading of the transcript shows that appellant made no admissions of any facts of which appellee did not already have documentary knowledge and information. The affidavits submitted in support of appellee's motion for an order of attachment, temporary restraining order and preliminary injunction (A. 109-134), shows that appellee already knew that appellant had received sizeable sums from the developer defendants (A. 205, 120-124). As stated by appellee's Vice President and General Counsel:

> "We knew, by virtue of facts already in our possession, that Haines had received sizeable sums from John Waits and corporations and associations owned or controlled by him. We did not know what Mr. Haines' explanation for his receipt of such substantial sums would be. When he told us that he received thirty-three thousand ($33,000.00) dollars from Mr. Waits as partial investment

> in property that was owned by Haines in Puerto Vallarta, Mexico, we were of the opinion that Haines was not making true disclosure but was attempting to cover up his improper activities. Thus, no unfair advantage was taken of Mr. Haines. In a sense, the reverse is true, for Mr. Kirschner informed Mr. Haines of, and showed him all of the documentary evidence that was then in Grant's attorneys' possession concerning Mr. Haines' illegal acts and breaches of fiduciary duties." (A. 205).

As stated by Mr. Kirschner:

> "Thus, no unfair advantage could have possibly been taken of Haines, since all of the statements made by him that morning relate to matters of which we already had knowledge." (A. 212).

Appellant cites T. C. Theatre Corp. v. Warner Bros. Pictures, 113 F. Supp. 265, 268 (S.D.N.Y., 1953), and Consolidated Theatres, Inc. v. Warner Bros. Circuit Management Corp. 216 F.2d 920 (2nd Cir. 1954) to support his assertion that the "thrust of the restriction on the attorney does not depend upon an affirmative showing that he in fact obtained confidential information but only that he had improper access to such information." (appellant's brief, p. 16) Both these cases involved situations of claimed conflict of interest on the part of the attorney. In T. C. Theatres, counsel for plaintiff was disqualified because he had formerly represented one of the defendants.

Similarly, in Consolidated Theatres, plaintiff's counsel was formerly an associate of the law firm which was representing the defendants in that case. As such, both cases involved former Canon 6 which dealt with adverse influences and conflicting interests. No comparative situation exists here. There is no claim, nor can there be, that appellee's attorneys should be disqualified because they formerly represented appellant or that they were in any way privy to confidential information imparted to them by appellant. The test in both T. C. Theatre Corp. and Consolidated Theatres was:

> "...the former client need show no more than that the matters embraced within the pending suit wherein his former attorney appears on behalf of his adversary are substantially related to the matters or cause of action wherein the attorney previously represented him, the former client." T. C. Theatre Corp. at 268.

There are no comparable circumstances here.

Moreover, appellant knew from the outset, that appellee's counsel were attorneys representing adverse interests and accusing him of serious criminal conduct. Accordingly, the rule of both T. C. Theatre Corp. and Consolidated Theatres has no applicability to the instant case.

Appellant has suffered no prejudice. Even though the

case has been pending almost ten (10) months now, appellant has yet to deny by pleading or affidavit, any of the charges made against him. It is submitted that absent such a denial, an attempted showing of prejudice is insufficient. Before an argument of prejudice can be successfully asserted, there must be at least a claim to a defense which was allegedly prejudiced. Absent such a claim, there can be no showing of "substantial and continuing" prejudice which would justify the drastic relief requested.

Appellant cites Doe v. A Corporation, 330 F. Supp. 1352 (S.D.N.Y., 1971), aff'd. sub. nom. Hall v. A. Corp., 453 F.2d 1375 (2d Cir. 1972) to support his contention that dismissal is proper. Appellant states at page 22 of his brief in discussing Doe, "the Court dismissed an action because of the violation by counsel for the plaintiff of Canon 4." What appellant neglects to bring forth before this Court is that in Doe, the attorney whose conduct was in question, was also the plaintiff in a derivative suit. Doe was an attorney formerly associated with the firm representing the corporate defendants. Doe did not dispute defendant's claim that every fact alleged in the complaint and upon which the lawsuit brought was based, was acquired by Doe while associated with the law firm that represented the defendants, and while Doe was engaged in legal work for the defendant as a client of the firm. The court

rightfully found that Doe's conduct violated Canon 4 of the Code of Professional Responsibility.[23] Accordingly, the Court dismissed the complaint that had been brought derivatively by the wrongdoing attorney without prejudice to the corporation or its shareholders initiating a similar suit. Id., 330 F. Supp. 1356.

In United States v. Thomas, 474 F.2d 110, 112, (10th Cir. 1973), defendant was convicted of certain criminal charges involving the distribution of drugs. The court found that use by the prosecuting attorney of appellant's statement, which had been obtained at an interview of the defendant by a government agent without appellant's attorney having been informed of the interview (and thus depriving appellant's attorney a reasonable opportunity to be present at the interview) was unethical. However, the court stated:

> "A violation of the Canons as here concerned need not be remedied by a reversal of the case wherein it is violated." U.S. v. Thomas, at 112.

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[23] Canon 4 provides:

> "A lawyer should preserve the confidences and secrets of a client." Code of Professional Responsibility, N.Y. Judiciary Law (McKinney Supplement 1974-75).

Similarly, in Lumbermen's Mutual Casualty Company, supra, 269 F.2d 478, the Fourth Circuit refused to reverse a district court judgment ordering the appellant insurance company to pay a judgment obtained against the company in a state court proceeding, although the Fourth Circuit found that the plaintiff's attorney in the state court action had violated the Canons by interviewing the adverse party without the permission or presence of his counsel.

Appellee's Counsel's Conduct Was Proper

Appellee's attorneys' conduct in interviewing appellant was proper. As is established by the record, appellee had substantial evidence of apparent wrongdoing on the part of appellant and other high-level executives. Appellee had documentary proof which indicated that appellant had committed violations of fiduciary duty. In such a situation an employer has the right to discharge the wrongdoing employee. Farmers Cooperative Co. v. National Labor Rel. Bd., 208 F.2d 296, 303 (8th Cir. 1953). Such a right is an "inherent power of management and one expressly protected by law." Id. Incident to that power is the right of the employer to investigate when it has reasonable grounds to believe there has been wrongdoing. An employer has the right to confront its employees whom it believes have been

guilty of wrongdoing and dishonesty.

As attorneys representing their client, appellee's counsel had the right to confront the employees on appellee's premises and on appellee's time in the presence of and on behalf of appellee. In fact, appellee's counsel had the duty to do so. Opinion No. 42, Committee on Professional Ethics, the Association of the Bar, (June 4, 1926), supra.

Canon 7 commands a lawyer to "... represent a client zealously within the bounds of law." Code of Professional Responsibility, supra. Indeed, failure to so represent a client would itself be improper conduct by an attorney. Appellee's counsel knew that prompt effective action was necessary to enable their client to be fully apprised of the extent of wrongdoing that had been committed against it and possibly obtain restitution without the necessity of prolonged litigation.

That "[T]he bounds of the law in a given case are often difficult to ascertain" is explicitly recognized by Ethical Consideration 7-2 of the Code of Professional Responsibility which further provides:

> "The language of legislature enactments and judicial opinions may be uncertain as applied to various factual situations. The limits and specific meaning of apparently relevant law may be made doubtful by changing or

> developing constitutional interpretations, inadequately expressed statutes or judicial opinions, and changing public and judicial attitudes. Certainty of law ranges from well-settled rules through areas of conflicting authority to areas without precedent." EC 7-2, Code of Professional Responsibility, supra.

The questions of law to be applied to adjudicate the propriety of the conduct of appellee's attorneys are not uncertain. Because appellant was not represented by counsel; because appellee's attorneys rendered him no legal advice; because appellee's attorneys did not misrepresent or mislead; and because there will be no prejudice sustained by appellant, the conduct is entirely ethical and proper.

> "Where the bounds of law are uncertain, the action of a lawyer may depend on whether he is serving as advocate or adviser. A lawyer may serve simultaneously as both advocate and adviser, but the two roles are essentially different. In asserting a position on behalf of his client, an advocate for the most part deals with past conduct and must take the facts as he finds them. By contrast, a lawyer serving as adviser primarily assists his client in determining the course of future conduct and relationships. While serving as advocate, a lawyer should resolve in favor of his client doubts as to the bounds of the law. In serving a client as adviser, a lawyer in appropriate circumstances should give his professional opinion as to what the ultimate decisions of the courts would likely be as to the applicable law." EC 7-3, Code of Professional Responsibility.

Accordingly as advocates, appellee's attorneys were required to resolve in favor of their client doubts as to the bounds of law. Resolving any such doubts in such manner would compel them to act as they did. Thus, it is respectfully submitted that for this Court to reverse the District Court would be to place upon attorneys an impossible obligation contrary to the considerations of EC 7-3; i.e. to represent zealously yet pursue a course of action only when there was no uncertainty as to the bounds of the applicable law.

Since appellee's attorneys acted properly such portions of the order of the District Court as appellant appeals should be affirmed.

POINT II

APPELLANT'S PURPORTED APPEAL FROM THE DISTRICT COURT'S CONTINUANCE OF THE ORDER OF ATTACHMENT GRANTED ON NOTICE IS JURISDICTIONALLY DEFECTIVE AND MUST BE DISMISSED.

The District Court's Continuance Of The Order Of Attachment Against The Property Of Appellant Is Not Appealable.

This Court has held that an order denying a motion to vacate an attachment is not appealable. West v. Zurhorst, 425 F.2d 919 (2nd Cir. 1970); Financial Services, Inc. v. Ferrandina, 474 F.2d 743 (2nd Cir. 1973). As stated by Judge Feinberg of this Court in Financial Services, Inc., supra, 474 F.2d 743, 745-746.

> "We have held that denials of motions to vacate attachments are not appealable under the collateral order gloss, see Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S. Ct. 1221, 93 L.Ed. 1528 (1949), on the 'final decision' requirement of 28 U.S.C. § 1291. West v. Zurhorst, 425 F.2d 919 (2d Cir. 1970); see Flegenheimer v. General Mills, Inc., 191 F.2d 237 (2d Cir. 1951). Were we to permit this appeal under § 1292 (a) (1) on these facts, we would sanction wholesale circumvention of the salutary rule of nonappealability reaffirmed in West. .... Rules of finality may not be so easily altered, cf. Fleischer v. Phillips, 264 F.2d 515, 516 (2d Cir.), cert. denied, 359 U.S. 1002, 79 S. Ct. 1139, 3 L.Ed. 2d 1030 (1959); International Products Corp. v. Koons, 325 F.2d 403, 406-407 (2d Cir. 1963)."

In West, supra this Court in holding that an order refusing to vacate an attachment is not appealable, discussed the language of Mr. Justice Frankfurter in Swift & Co. Packers v.

Compania Colombiana Del Caribe, S.A., 339 U.S. 684 (1950):

> "Mr. Justice Frankfurter said that while an order vacating an attachment that afforded the sole basis for jurisdiction was appealable, 'the situation is quite different where an attachment is upheld pending determination of the principal claim,' citing Cushing v. Laird, 107 U.S. 69, 2 S. Ct. 196, 27 L.Ed. 391 (1883). Swift & Co. Packers v. Compania Colombiana del Caribe, S. A., 339 U.S. 684, 689, 70 S. Ct. 861, 94 L.Ed. 1206 (1950). Relying on the holding in Cushing and the dictum in Swift, this Court has dismissed an appeal from an order refusing to vacate an attachment even in a case, stronger for appealability than this one, where an intervenor claimed the attached property was its rather than the defendant's. Flegenheimer v. General Mills, Inc., 191 F.2d 237 (2 Cir. 1951) See also American Mortgage Corp. v. First National Mortgage Co., 345 F.2d 527 (7 Cir. 1955). The increase in the burden on the courts of appeals in the last decade, with nearly three times as many appeals in 1969 as in 1960, see Administrative Office of the United States Courts, Annual Report of the Director, 1969, Table II-4, hardly suggest the desirability of an expansive reading of Cohen, even if controlling decisions left us freer in that respect than we think. While the grievance created by an improper attachment pendente lite is 'important', 337 U.S. at 546, 69 S. Ct. 1221, it is not important enough to make the decision 'final'." West, supra, 425 F.2d 921.

The order of the District Court continuing the orders of attachment after dismissal of the complaint pending appeal and granting leave to the plaintiff to file an amended complaint within twenty (20) days is equivalent to an order denying a motion to vacate an order of attachment. The fact that the title or style of the order is different is not important. Indeed, this has been recognized by this Court in Financial Services, Inc., supra. There the appeal was from an order denying preliminary injunctive relief in an action brought to restrain the United States

Marshal from enforcing an order of attachment rendered in an earlier action and for repayment of any sums already collected. This Court agreed with the District Court in that the injunction sought in that case was no more than a motion to vacate the attachment rendered in the first action by another name. Financial Services, Inc., supra, 474 F.2d 743, 745.

Nor do the facts of the instant case require a different holding than this Court made in Financial Services and West. The fact that the complaint against appellant was dismissed by the District Court does not distinguish this case. Rule 64 of the Federal Rules of Civil Procedure (West, 1970) provides:

> "At the commencement of and during the course of an action, all remedies providing for seizure of personal property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the District Court is held, existing at the time the remedy is sought, ..." Rule 64, Federal Rules of Civil Procedure.

Under New York procedure an order of attachment may be granted prior to the service of the summons. Section 6211 of the CPLR (McKinney, 1963) provides in part:

> "An order of attachment may be granted without notice, before or after service of summons and at any time prior to judgment".

In view of the foregoing the order of the District Court continuing the order of attachment is not appealable, and that portion of the present appeal from said order should be dismissed.

Assuming Arguendo That The Order Continuing The Order of Attachment Is Appealable, The Present Appeal Is Untimely.

Appellant purports to appeal from the order below continuing the order of attachment against the property of appellant following vacating service of process. The notice of appeal filed by appellant states that the appeal is from "such parts of the Order of the District Court (Charles L. Brieant, J.) entered June 3, 1975 as ... continued in effect an order of attachment against the property of Mark S. Haines located outside of the State of New York following dismissal of the complaint and vacation of service of process upon him." (A. 267). It is evident, however, that appellant is actually appealing the correctness of the order of attachment itself and not the order continuing the order of attachment (appellant's brief 27-29). As such, the appeal is untimely. The order of attachment was signed February 3, 1975. No notice of appeal was filed from that order. (See docket sheets, A. 3-8). The notice of appeal pertaining to this appeal was filed on June 26, 1975. Rule 4 of the Federal Rules of Appellate Procedure mandates that

> "... in a civil case... in which an appeal is permitted by law as of right from a District Court to a Court of Appeals the notice of appeal required by Rule 3 shall be filed with the Clerk of the District Court within thirty (30) days of the date of entry of the judgment or order appealed from."

since the notice of appeal was filed long after the requisite

time period, it is jurisdictionally defective.[23]

Few principles of law are as fundamentally established as the one that unless an appeal is timely taken by filing the notice of appeal within the prescribed time period, the Appellate Court lacks jurisdiction to hear it. Berman v. United States 378 U.S. 530 (1964); United States v. Robinson 361 U.S. 220 (1960); 9 Moore's Federal Practice ¶ 204.02 (1975) and cases cited therein.

That the present appeal is actually from the order of attachment itself is evident from analysis of the arguments contained in the appellant's brief. Appellant concentrates his attack on the impropriety of the District Court's having issued an order of attachment directed to any U.S. Marshal in any district in the United States of America. However, that issue is now foreclosed from consideration by this Court because of appellant's failure to file a timely notice of appeal from the order of attachment.[24]

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[23]Rule 4 does specify that upon a showing of excusable neglect, the District Court may extend the time for filing the notice of appeal by any party for a period not to exceed thirty (30) days from the expiration of the time otherwise prescribed by this subdivision. No such extension of the time for filing the notice of appeal has been granted in this case.

[24]Moreover, even if a notice of appeal had been filed from the order of attachment, such an order similar to the order refusing to vacate an order of attachment is not appealable. See discussion, supra, pp. 63-65.

POINT III

THE ORDER OF THE DISTRICT COURT CONTINUING THE ORDERS OF ATTACHMENT FOR TWENTY DAYS PENDING THE FILING OF AN AMENDED COMPLAINT AND PENDING APPEAL WAS PROPER.

The Order Of Attachment Was Proper

Since the order of attachment was issued on notice to appellant there is no doubt that the District Court had the authority to issue it pursuant to Rule 64 of the Federal Rules of Civil Procedure (West, 1970).

New York CPLR § 6201 (McKinney 1963) specifies the grounds for an issuance of an order of attachment. The issuance of an order of attachment in the District Court was authorized on the grounds that appellant was not a resident or domiciliary of the state; and the appellant in an action upon a contract, express or implied, has been guilty of a fraud in contracting or incurring the liability; and there is a cause of action to recover damages for fraud. (§ 6201 (1), (5), (8)).

Appellant argues that the order issued by the District Court is defective because pursuant to CPLR § 6211 an order of attachment is to be "directed to the sheriff of any County or of the City of New York where any property in which the defendant has an interest is located or where a garnishee may be served."

However, federal courts have read the word "county" in state statutes as meaning "federal district" where the state

statute is involved in the federal proceeding. Erwin v. Barrow, 217 F.2d 522 (10th Cir. 1954); Weisler v. Matta, 95 F. Supp. 152 (W. D. Pa. 1951); Setterlund v. Spierer, 11 F.R.D. 601 (S.D. No., 1951). "County" in the New York attachment statute should be read as "federal district," when the attachment remedy is utilized by the federal court, and the U.S. Marshal of each district should be construed as the equivalent of the sheriff of each New York county. Thus, assuming appellant can argue this issue on appeal this Court should hold that the order of attachment directed to any U.S. Marshal by the District Court is proper.

This is consistent with 28 U.S.C.§1963 which provides that upon registration of a judgment obtained in a district court in any other district by filing, such judgment has the same effect and may be enforced as a judgment of the district court where it is registered. Furthermore, nationwide orders of attachment in postal suits are expressly recognized by 28 U.S.C. § 2710.

Dunn v. Printing Corporation of America, 245 F. Supp. 875 (E.D. Pa., 1965) and Wilcox v. Richmond, Fredericksburg & Potomac R. Co., 270 F. Supp. 454, (S.D.N.Y. 1967) are distinguishable from the instant case. In both those cases the attachment was the sole basis for jurisdiction; personal jurisdiction over the defendants had not been acquired. Here, appellant had been personally served in New York, thus giving the District Court in personam jurisdiction over appellant and appellant was amenable to service in accordance with New York's long arm statute. CPLR § 302 (a) (2) (3). (McKinney Supplement 1974-75).

Federal Deposit Insurance Corporation v. Greenberg, 487 F.2d 9 (3rd Cir. 1973), disaffirmed the Dunn holding and held that failure to comply with the state rules identifying the courts from which writs of foreign attachment issue did not violate otherwise proper service under the Federal Rules.

The District Court dismissed the complaint although it was aware that apparently diversity of citizenship existed (A. 263). Furthermore, the District Court believed that the appellee would file an amended complaint alleging a claim under Robinson-Patman, (A. 244) since such a claim had been discussed in memorandum submitted opposing the motions to dismiss. Accordingly, continuing the attachments pending the filing of such an amended complaint which has now been filed, (A. 336-369) was proper. Continuation of the attachment pending appeal was also proper as an exercise of the Court's power to maintain the status quo[25].

CONCLUSION

For the foregoing reasons, such portions of the order appealed from are correct and should be affirmed.

Respectfully submitted,

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[25] Appellee timely filed a motion to reargue those portions of the order of the District Court which dismissed Count I and vacated service on appellant and another defendant. Accordingly, appellee's time to appeal has not commenced to run. 9 Moore's Federal Practice ¶ 204-12[1] (1975)

APPENDICES

MR. FALICK: All right.

Q Did you, prior to attending this meeting, know what the purpose of the meeting was going to be?

A Yes.

Q What was the purpose?

A To inform the stockholders, officers, directors and employees of W. T. Grant that the termination of three executives was not in conjunction, was not a further extension of Grant's personal financial difficulties.

Q Were any stockholders or directors present?

A No.

MR. KIRSCHNER: Directors?

THE WITNESS: Directors, yes.

MR. KIRSCHNER: Stockholder?

THE WITNESS: I don't know who is a stockholder of Grants.

Q Was this to be done through the press?

A Yes.

Q Would you then say that the purpose of this meeting was actually a publicity meeting?

A I wouldn't say that.

Q Certainly though publicity was considered when the meeting was arranged?

MR. KIRSCHNER: That is argumentative.

Service of 4 copies of this within
Brief is admitted this
3 day of November 1975

for appellant

COPY RECEIVED
LAYTON & SHERMAN
11/3/75 - 2:45 P.M.